No. 80-1445

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

PATRICIA CAMPBELL HEARST,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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I

AN EVIDENTIARY HEARING WOULD SHED NO MORE LIGHT ON THE ISSUE NOW BEFORE THIS COURT. ALSO, THE PROSPECT OF ANOTHER ROUND OF HEARINGS, APPEALS, AND PETITIONS TO THIS COURT AS APPARENTLY SUGGESTED BY RESPONDENT THREATENS IN AND OF ITSELF AN INJUSTICE TO PETITIONER.

We will seek here to demonstrate that the record is complete with the admitted contracts and covenants. Notice of the existence of such documents would, we believe, pursuant to this court's holding in *Cuyler v. Sullivan*, 466 U.S. 335 have obligated the trial court to remove trial counsel

from the case at the initial stages of trial proceedings. Certainly, that was the result in *Maxwell v. Superior Court of Los Angeles,* 101 Cal. App. 3d 341, wherein the court held

> ". . . a conflict of interest which arises from the fee interest potential of the retainer agreement here is so inherently conducive to divided loyalties as to amount to a denial of the right to effective representation as a matter of law . . ." Id. at page 344.

Maxwell is not inconsistent with this court's holdings in *Sullivan,* inasmuch as this court requires that trial courts exercise supervisory power to inquire into apparent conflicts of interest and, when necessary, to remove counsel rendered "insufficient" thereby.[1] *Cuyler v. Sullivan,* 100 Supp. Ct. 1708, 1717, note 10. Certainly avoiding a risk before trial can in some instances be different from avoiding a conviction after a trial without some affirmative demonstration that the risk has actually been realized. Nonetheless, a vacation of the resulting conviction is required by *Sullivan,* and would have been the result had this case proceeded to the California Supreme Court. *People v. Corona,* 80 Cal. App. 3d 684 (hearing denied);

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[1]This court recently granted certiorari to decide whether it was constitutional to imprison a probationer because he couldn't pay his fine. However, this court on its own motion remanded to determine where there was a conflict of interest. The issue had not been raised by the petitioner since *his lawyer* was apparently involved. This court noted that "further proceedings may be had as *may be just* under the circumstances" citing Stern & Gressman, *Supreme Court Practice* S.6.27 at 460. *Wood v. Georgia* No. 79-6027 28 CLR 22 (Mar. 4, 1981). A remand in petitioner's case in view of the burden to her from the delay and further hearings would not be just in view of the clarity of the issue and divergence in California law.

145 Cal. Rptr. 894; *People v. Superior Court* (Corona) 110 Cal. App. 3d 200, 208; *Maxwell v. Superior Court,* 101 Cal. App. 3d 341. These authorities recognize that where the attorney has put himself in a position to have personal financial interests in the exercise of his judgment, the mere existence of those interests reduce to unworthy riddle games the task of determining whether the expressed strategical value of such judgments or the financial interest of the attorney, motivated or influenced the attorney's decision-making process. The declarations of the attorney under such circumstances would have little value. Indeed, he may not be able to objectively assess the situation with which he was faced at the time of trial.[2]

Certainly, as the solicitor general points out, (RES 7 par 2)

> "a lawyer has an ethical obligation to avoid conflict of interests that may result from multiple representation . . ."

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[2]A lawyer, no less F. Lee Bailey, might often make his living by rationalizing the conduct of his clients; certainly, under these circumstances, he will be no less adept at rationalizing his own conduct. It would be incongruous to make the validity of the district court's ruling dependent upon an accurate assessment of the value of Bailey's testimony explaining the effect on his judgment in view of his inconsistent interests. This is particularly true when his strategical decisions were consistent with the interests of his publisher, and demonstrably damaging to the case of petitioner (i.e., waiving her right not to give testimony thereafter "taking the 5th" before the jury 42 times). For example, as stated by the Court of Appeals for the 9th Cir. on petitioners direct appeal, Bailey "could not have believed . . ." petitioner could have testified on the merits during her trial without subjecting herself to cross-examination, *U.S. v. Hearst,* 563 F.2d 1331 at 1342.

To equate the ethical obligation to avoid personal conflicts of interests to multiple representation cases would seem to be wide of the mark—a lawyer acting for two employers (with inconsistent objectives) is rendered insufficient by the nature of his voluntary action in hiring himself out in such an inconsistent dual capacity. In multiple representation cases, an evidentiary hearing may enlighten the court as to whether or not the purposes of multiple employers were at odds one with the other. In multiple representation cases some examination may be necessary to determine whether or not common defendants chose a common lawyer freely and intelligently based on their view that such a choice would strengthen their defense (446 U.S. at 348).

It is apparent from the very nature of the conflict here that the purposes of the publisher are at odds with the purposes of the representation to which petitioner is entitled. An evidentiary hearing would result in no further enlightenment of this court and would, we believe, cause disrepute on the bench and the bar as a result of the spectacle caused by the guessing games resulting. For example, it is clear that a publisher is interested in complete public disclosure. Her trial counsel, no novice at the publishing game (Pet. App. A-46, n.20), knew this. On the other hand petitioner's interest (unless clearly stated otherwise) is in the preservation of the attorney-client confidentiality. In any event petitioner, with no experience with the courts, was in no position to independently assess the implications of having a lawyer with book publishing ambitions. Also, it is obvious that a publisher must have a date certain as soon as possible after the publicity in which to publish a book.

The success of any such book depends on capturing a market, at least contemporaneous with competition, inflamed by sensational news reports of the events leading up to the trial and, indeed, the trial itself. On the other hand, petitioner's interests, obviously, were to delay or change the location of the trial pursuant to motions for continuance and/or change of venue so the same public interest might be abated. It is only in this manner that a jury can approach the evidence in a rational and objective manner.

Furthermore, petitioner has declared in an affidavit that she neither participated in nor had knowledge of the mid-trial contract executed by F. Lee Bailey with his publisher. (Pet. App. 7.) Nonetheless, the client was caused by Mr. Bailey to execute the covenant of March 22 which seemed calculated to protect the publisher's investment (to be paid to Bailey). Certainly the subject matter of a book was discussed with petitioner beforehand. Otherwise it would have been impossible to approach her with the March 22 covenant. The divergence of interest between petitioner and her counsel is clear and disturbing. It is doubtful that independent counsel would have advised petitioner to sign the March 22 covenant releasing her lawyer to tell the world what he knows about her and at the same time causing her to cooperate with her counsel for the benefit of the publisher and her counsel. (Pet. App. A-3)

Finally, as pointed out by the U.S. Court of Appeals (Pet. App. A-17 Note 6), the publisher is interested in a performance from the lawyer having literary value. The interest of the petitioner, on the other hand, is in having a lawyer who does what is necessary, regardless of public

relations or public interest, to effectively represent her at trial.

If the State of California has adopted a "per se rule" there is a sound reason. Where counsel has unilaterally created a situation where he had to make decisions under the constraint of inconsistent obligations to diverse employers whose purposes are at odds, the mandate of the Sixth Amendment cannot be satisfied. Any ambiguity in this court's decision will certainly cause rationalization by future counsel seeking to capitalize on the otherwise privileged information they obtained from their clients by executing book contracts in violation of the canons as discussed by the U.S. Court of Appeals herein. The existence of such a dual obligation, furthermore, casts an impossible burden on appellate courts to weigh in each instance whether there has been the required "adverse effect". Certainly it is a rare counsel (or any other professional) who admits to a frame of mind "impugning his professional efforts". *Cuyler v. Sullivan*, supra, at 1723.

II

AN EVIDENTIARY HEARING BEFORE A DISTRICT COURT WHO WAS NOT THE TRIAL JUDGE WILL YIELD NO MORE COMPLETE A MATERIAL RECORD THAN IS NOW IN EXISTENCE UPON WHICH TO BASE A DECISION IN THIS CASE.

The solicitor general argues that a hearing is necessary because the issues can be better resolved on the basis of a complete record. The futility of such a hearing is best illustrated by examining the previous factual and legal de-

terminations of the U.S. District Court, and, in contrast, of the U.S. Court of Appeals (Appendices A and B).

The district court predicated its denial of petitioner's 2255 motion on a ruling that there was "no prejudice" to petitioner as a result of the prohibited book contracts. The district court stated that the evidence was more than sufficient for a conviction. However, the district court seemed to resolve issues of fact against petitioner. Without taking evidence the Court determined "that none of the evidence offered in her behalf, even if clearly established at an evidentiary hearing, would entitle her to relief" (Pet. App. A-27). The district court predicated this conclusion not only on an absence of "prejudice" but, in addition, the court characterized petitioner's specific complaints as "speculative, unfounded assertions completely unwarranted by the record" (A-46), and, stated that since Defendant's application discloses she was "fully aware"[3] prior to trial that Bailey wished to write a book, there was, as far as the district court was concerned, a "pallor of insincerity" over petitioner's contentions (Pet. App. A-52).

The Court of Appeals observed the same record as did the District Court. The U.S. Court of Appeals found as follows:

> "Bailey's potential conflict of interests is virtually admitted, and Hearst had alleged an actual conflict and

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[3]The Court of Appeals found that petitioner declared by affidavit that before trial "Johnson *told* her that Bailey would write a book about her . . . that she *had* to agree" because of fee arrangements between petitioner's parents and her counsel, but she "was not to discuss it." Petitioner's father *denied* book rights were part of the fee arrangement for the trial (A-4).

adverse effect *insufficient and not implausible* detail" (A-10).

The U.S. Court of Appeals found Bailey's conduct to "raise serious questions as to whether Bailey . . . (has) been guilty of conduct unbecoming members of the bar." (Pet. App. A-16). Citing the apparent violations of ABA, CPR disciplinary rule 5-101 (A) and 5-104 (B), and, rule 1.9 (d) of the discussion draft of ABA model rules of professional conduct, 48 U.S.L.W. No. 32 et. 8 (Feb. 18, 1980), the Court of Appeals suggested to the same district court previously holding petitioner's claims amounted to a "fanciful version of the facts" (Pet. App. A-10) that he issue an order to show cause why Bailey should not be disciplined for his conduct. This, the solicitor general urges, will successfully call for a resolution of the issue based on the trial record and Bailey's testimony by a trial judge who was not present during trial proceedings.

CONCLUSION

It is important, and perhaps decisive in this case, that petitioner will not have the benefit of the judgment of the court presiding over her trial during any evidentiary hearing. Judge Oliver J. Carter, the trial judge, died prior to petitioner's sentencing. (Pet. App. A-24 n.2) She was thereafter sentenced to seven years by the court currently presiding over her case on September 24, 1976. Since that time, these appellate proceedings have followed. The Court of Appeals noted (Pet. App. A-11 n.4) that under the circumstances, the standard must be *administered strictly* in determining issues from the cold record. It would seem consistent, therefore, for this court to recognize that in such cases there is more to lose than to gain by an evidentiary hearing calculated to shed light on the truth when, from the nature of things, that goal seems unobtainable thereby. If this is so, other elements of the criminal justice system must be considered, particularly the integrity of the trial process itself as an integral component of the system of justice. Accordingly, we argue that only this court can resolve the issue at hand in this case. To predicate the resolution of this issue on what seems in this case to be a ritualistic procedure which will not assist the court in determining the truth seems both harsh, and unnecessary to the administration of justice. A hearing should be granted.

Dated:

Respectfully submitted,

George C. Martinez